IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Case No. 79-6309

RAYMOND ROBERT CLARK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDICES FOR SUPPLEMENTAL BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

IN THE

SUPREME COURT OF FLORIDA

CASE NO. 59,732

JOSEPH GREEN BROWN, ALVIN BERNARD FORD, JESSE RAY RUTLEDGE, CARL ELSON SHRINER, DANIEL MORRIS THOMAS, AUBREY DENNIS ADAMS, JR., FRED LYMAN BRUMBLEY, DANIEL L. COLER, VERNON RAY COOPER, GREGORY SCOTT ENGLE, DAVID LIVINGSTON FUNCHESS, ROBERT D. HEINEY, MARVIN E. JOHNSON, LESLIE R. JONES, ROBERT F. LEWIS, BOBBY EARL LUSK, THOMAS McCAMPBELL, CHARLES DWIGHT MESSER, FLOYD MORGAN, DONALD PERRY, JAMES LEROY PHIPPEN, JAMES DAVID RAULERSON, JIMMIE LEE SMITH, WILLIAM GILVIN, BRYAN JENNINGS, RICHARD KING, GREGORY MILLS, ROBERT LEWIS BUFORD, WILLIAM CHRISTOPHER, RAYMOND ROBERT CLARK, ROBERT COMBS, RAYMOND L. DRAKE, EARL ENMUND, WILLIAM JENT, AMOS LEE KING, HAROLD GENE LUCAS, ANTHONY RAY PEEK, RALEIGH PORTER, M.C. RUFFIN, DONALD WALSH, JOHNNY PAUL WITT, STEVEN BEATTIE, McARTHUR BREEDLOVE, ALONZO BRYANT, BOBBY MARION FRANCIS, MARVIN FRANCOIS, LENSON HARGRAVE, RONALD JACKSON, ANTONIO MENENDEZ, THOMAS PERRI, WARDELL RILEY, LEON SCOTT, ROY STEWART, MERLE STURDIVAD, GARY TRAWICK, MANUEL VALLE, JAMES ADAMS, LEVIS LEON ALDRIDGE, ALLEN L. ANDERSON, DAVID ROSS DELAP, WILLIAM DUANE ELLEDGE, GEORGE VICTOR FRANKLIN, WILLIAM LANAY HARVARD, JAMES E. HITCHCOCK, MONROE HOLMES, JOHN P. MAGGARD, NOLLIE LEE MARTIN, WINDFORD MINES, ELDRED LONNIE MOODY, JAMES A. MORGAN, TOMMY LEE RANDOLPH, JAMES FRANKLIN ROSE, PAUL WILLIAM SCOTT, WILLIE CLAYTON SIMPSON, TERRY MELVIN SIMS, HENRY PERRY SIRECI, JR., JOSEPH ROBERT SPAZIANO, JESSE JOSEPH TAFERO, SOLOMON WEBB, WILLIAM GLENN WELTY, WILLIAM MELVIN WHITE, GARY ELDON ALVORD, ANTHONY ANTONE, LUIS CARLOS ARANGO, SAMPSON ARMSTRONG, ELLWOOD BARCLAY, RICHARD BLAIR, BERNARD BOLANDER, STEPHEN TODD BOOKER, THEODORE BUNDY, JOHNNY COPELAND, PRESTON CRUM, WILLIE JASPER DARDEN, BENNIE DEMPS, ERNEST JOHN DOBBERT, HOWARD VIRGIL LEE DOUGLAS, JOHN E. FERGUSON, CHARLES KENNETH FOSTER, ARTHUR FREDERICK GOODE, III, FREDDIE LEE HALL, CARL JACKSON, ELIGAAH ARDALLE JACOBS, THOMAS KNIGHT, JOHN WALLACE LeDUC, PAUL EDWARD MAGILL, ROY McKENNON, DOUGLAS RAY MEEKS, MARK MIKENAS, EDDIE ODOM, TIMOTHY PALMES, CHARLES WILLIAM PROFFITT, MICHAEL SALVATORE, FRANK SMITH, CARL RAY SONGER, WALTER STEINHORST, RUFUS STEVENS, RAYMOND R. STONE, RONALD STRAIGHT, ROBERT A. SULLIVAN, WILLIAM LEE THOMPSON, CHARLES VAUGHT, DAVID LEROY WASHINGTON, JAMES BUFORD WHITE,

Petitioners,

-v.-

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida,

Respondent.

APPLICATION FOR EXTRAORDINARY RELIEF AND PETITION FOR WRIT OF HABEAS CORPUS

Petitioners, through their undersigned counsel, apply to this Honorable Court for relief from their unconstitutional sentences of death and further appropriate relief, and, in support thereof, state:

I.

PARTIES

Petitioners are all death-sentenced inmates presently incarcerated at Florida State Prison in Starke, Florida, whose convictions and sentences were affirmed by or whose appeals are currently pending before this Court. (See Appendix A filed herewith).

Respondent, Louie L. Wainwright, is the Secretary of the Department of Corrections in whose custody the petitioners are detained.

II.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Article V, Section 3(b)(1), (7) and (9) of the Constitution of the State of Florida (1980). See Adams v. State, 380 So2d 421(Fla.1980); Graham v. State, 372 So2d 1363(Fla. 1979); Proffitt v. State, 360 So2d 771(Fla. 1978). Petitioners seek relief in this Court because the issues raised herein involve this Court's appellate review of capital cases and do not involve the proceedings in the trial courts. Petitioners have filed jointly in the interest of judicial economy because of the common issues of law and fact presented. See In Re Baker, 267 So2d 331(Fla.1972).

III.

FACTUAL BASIS FOR RELIEF

This Court, since at least as early as 1975, has engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal. The information includes but is not limited to: presentence investigation reports concerning the capital offense under review or prior convictions unrelated to the capital offense; psychiatric evaluations or contact notes; psychological screening reports; recitations of a capital defendant's refusal

to submit to a psychiatric examination from which a report could be prepared; post-sentence investigation reports; probation or parole violation reports; and state prison classification and admissions summaries. Documentation of the practice is provided by the correspondence attached as Appendix B which is merely exemplary. Petitioners also attach in Appendix C newspaper accounts of the practice. While such accounts are admittedly hearsay, they are well-substantiated by the documents in Appendix B.

Except as to some of the presentence investigations pertaining to the offense on appeal the above information was requested and received without notice to the capital appellants or their attorneys.

Upon information and belief, a quantity of the information received by the Court, and of records reflecting the practice of requesting and receiving it as alleged in the preceeding paragraph, has at the Court's direction been destroyed or purged from this Court's files. As a result, it is no longer possible for petitioners to identify all of the cases in which such information was requested or received.

IV.

LEGAL CLAIMS

The request or receipt by this Court of undisclosed information in capital cases, as described above, violates inter alia, petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida; the right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 16 of the Constitution of the State of Florida; the Eighth Amendment to the Constitution of the United States and Article I, Section 17 of the Constitution of the State of Florida; the privilege against self-incrimination as guaranteed by the Fifth Amendment to the Constitution of the United States and Article I, Section 9

of the Constitution of the State of Florida; the right to confrontation as guaranteed by the Sixth Amendment and Article I, Section 16 of the Constitution of the State of Florida; and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 2 of the Constitution of the State of Florida.

A. The Due Process Right to Fair Capital Procedures

The practice described above violates Gardner v. Florida, 430 U.S. 349(1977). In Gardner, the United States Supreme Court held unconstitutional the imposition of a death sentence where, in considering what sentence to impose, a Florida circuit court had ordered and relied on a pre-sentence investigation report, portions of which were not disclosed to the parties. The plurality emphasized that, in capital cases,

> it is now clear that the sentencing process as well as the trial iteself, must satisfy the requirements of the Due Process Clause . . . .

Id. at 358 (opinion of Mr. Justice Stevens). It held that due process was denied since "the death sentence was imposed, at least in part, on the basis of information which [petitioner] had no opportunity to deny or explain." Id. at 362. See also Green v. Georgia, 442 U.S. 95, 97(1979) and Presnell v. Georgia, 439 U.S. 14, 16(1978).

Gardner requires a similar conclusion here. The only real difference between Gardner and these cases is that here the secret information was gathered on appeal rather than at trial. Rather than providing a basis on which to distinguish these cases, this fact aggravates the unfairness to petitioners. The preparation of a pre-sentence report is a relatively normal and expectable occurrence in the trial court, and defense counsel might legitimately be expected to be on notice that such an event may happen, and, before Gardner at least, might engender confidential information. No lawyer familiar with Florida statutes, rules and procedures could be expected to anticipate, however, that without notice to the lawyer or the lawyer's client,

this Court would request or receive information dehors the record. Here, certainly no less than in Gardner, it would be a violation of the Fourteenth Amendment's Due Process Clause "to impose the death sentence on the basis of confidential information which is not disclosed to the defendant or his counsel." Gardner v. Florida, supra, 430 U.S. at 358.

It is a further violation of Due Process for this Court to have consulted "evidential facts not spread upon the record," Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292,300(1937), so that "even now we do not know the particular or evidential facts of which the [Court]... took judicial notice and on which it rested its conclusion." Id. at 302.

It is also a violation of due process for an appellate court to rely for disposition of an appeal upon factual grounds other than those relied upon by the trial court. Presnell v. Georgia, supra; Eaton v. City of Tulsa, 415 U.S. 697(1974); Cole v. Arkansas, 333 U.S. 196(1948). To the extent that the affirmance of any of petitioners' cases was affected by information outside the trial record, their due process rights were further violated.

The Court's sua sponte consultation of extra-record materials and information in the consideration of capital appeals contravenes petitioners' fundamental rights to due process of law.

B. The Right to the Effective Assistance of Counsel

The guarantee of the effective assistance of counsel is as applicable on appeal as at trial. Anders v. California, 386 U.S. 738(1967); Ross v. State, 287 So2d 372(Fla.2d DCA 1973); Davis v. State, 276 So2d 846(Fla.2d DCA 1973), aff'd 290 So2d 30(Fla.1974). This right is denied not merely by the denial of counsel but by any hampering "restrictions upon the function of counsel in defending a criminal prosecution in accord with

the traditions of the adversary fact-finding process." Herring v. New York, 422 U.S. 853,857(1975). Accord: Ferguson v. Georgia, 365 U.S. 570(1961); Brooks v. Tennessee, 406 U.S. 605(1972); Geders v. United States, 425 U.S. 80(1976). In Gardner v. Florida, 428 U.S. 908,909(1976) certiorari was granted on both a Sixth and a Fourteenth Amendment question. In its decision, the Supreme Court of the United States held that "[e]ven though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel."[Citing Mempa v. Rhay, 389 U.S. 128(1967) and Specht v. Patterson, 386 U.S. 605(1967)]. Gardner v. Florida, 430 U.S. 349,358(1977). Implementing Gardner, this Court has recognized that counsel must be afforded adequate time to prepare pertinent rebuttal evidence in order for a defendant to be given a meaningful "opportunity to be heard." Barclay & Dougan v. State, 362 So2d 657,658(Fla.1978). This Court's request for or receipt of confidential information, without notice to or access by petitioners and their counsel, violates the petitioners' rights because their counsel are afforded no opportunity to explain, deny, or place in context the information. The exclusion of counsel from the process of weighing such information proceeds from the:

> erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.

Gardner v. Florida, supra, 430 U.S. at 360. On the appeal of a capital case, no less than at trial, the Sixth Amendment guarantees "the guiding hand of counsel" to a criminal defendant. Powell v. Alabama, 287 U.S. 45,57(1932).

C. The Right to Confrontation

The Sixth Amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." See generally Pointer v. Texas, 380 U.S. 400(1965); Douglas v. Alabama, 380 U.S. 415(1965).

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-243(1895). A defendant's Confrontation Clause rights are not limited to trial of the case but attach wherever evidence is admitted relevant to the issues to be adjudicated. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." Lewis v. United States, 146 U.S. 370, 373(1892). A defendant is entitled to confront the witnesses against him in any proceeding "after the case is called for trial which involves his substantial rights." Hopt v. Utah, 110 U.S. 574, 578(1884). See also Rogers v. United States, 422 U.S. 35, 39-40(1975). The evidence which this Court has received has never been tested by the equivalent of cross-examination, cf. Ohio v. Roberts, ___U.S.___ 100 S.Ct. 2531(1980), and is of a notoriously unreliable sort (See ¶ D. infra). While in some limited circumstances, hearsay reports might be admissible if the prosecution makes a solid factual showing of the preparer's "unavailability" as a witness at the time of trial and if, in addition, the report bears adequate "'indicia of reliability'", Mancusi v. Stubbs, 408 U.S. 204, 213(1972), in the present cases, defense counsel

were unaware of the very existence of the reports that may have affected the appeals in petitioners' cases. There was no opportunity here to confront the reports themselves and the consequences of this Court's request or receipt of the reports, let alone the preparers of the reports.

D. The Eighth Amendment Right to Reliability in Capital Sentencing

In Woodson v. North Carolina, 428 U.S. 280, 305(1976) the Supreme Court recognized that, under the Eighth Amendment "death is a punishment different from all other sanctions in kind rather than in degree." "[T]his qualitative difference between death and other penalities calls for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604(1978). Accordingly,

> [t]o insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. (Footnote omitted). Beck v. Alabama, ___ U.S. ___, 100 S.Ct. 2382, 2389-90 (1980).

It is hard to conceive of evidence more fraught with danger when considered ex parte than the subjective psychiatric/psychological/correctional reports received by this Court, unsubjected to professional explanation and adversarial cross-examination. Addington v. Texas, 441 U.S. 418(1979); Smith v. Estelle, 602 F.2d 694(5th Cir.1979), cert. granted, 100 S.Ct. 1311(1980). See generally, Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif. L. Rev. 693(1974). As the Supreme Court of the United States stated in Kent v. United States, 383 U.S. 541, 563(1966):

> [T]here is no irrebutable presumption of accuracy attached to staff reports. If a decision on [the sentence of life or death] . . . is 'critically important' it is equally of 'critical importance' that the material submitted to the judge . . . be subjected, within reasonable

> limits . . . to examination, criticism and refutation.

The risk that an appellant may be the victim of inaccurate information is precisely the same here as in Gardner. In a case where a mistake may send an appellant to his electrocution, the risk is simply not a constitutionally acceptable one:

> From the point of view of the defendant [the penalty of death] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Id. at 357-358. See also Godfrey v. Georgia, ___U.S.___, 64 L.Ed. 2d 398, 409(1980). In the words of Mr. Justice Overton, "often secrecy is considered the opposite of credibility," Forbes v. Earle, 298 So2d 1, 4(Fla. 1974).

E. The Eighth Amendment Right to Proportionality in Capital Sentencing

The Eighth Amendment requires that the death penalty be applied in accordance with a rational and regular sentencing procedure which takes into account both the nature of the crime and the culpability of the individual offender. Woodson v. North Carolina, 428 U.S. 280, 303(1976). The constitutionality of Florida's capital punishment statute was upheld in 1976 on the explicit assumption that review in this Court would be satisfactory to guard against capricious and disproportionate infliction of the death penalty:

> [M]eaningful appellate review of each . . . [death] sentence is made possible, and the Supreme Court of Florida . . . considers its function to be to '[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.... in light of the other decisions and determine whether or not the punishment is too great'. State v. Dixon, 283 So2d 1, 10(1973).

Proffitt v. Florida, 428 U.S. 242, 251(1976). The secret use of sentencing evidence by this Court "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett v. Ohio, 438 U.S. 586, 605(1978). Accord: Beck v. Alabama, ___U.S.___, 100 S.Ct. 2382, 2389(1980).

The sua sponte request and receipt of evidence by this Court makes it impossible to assure either that the Court's general appellate function or the Court's role as the third step in the "trifurcated" sentencing process will not result in the capricious or disproportionate imposition of the death penalty. The formal record on the basis of which the death sentence is imposed will necessarily be incomplete, with parts of it invisible to counsel, to the trial courts, to the federal courts, and to this Court itself as Justices change over time. This is a constitutional defect, for the handling and treatment of confidential sentencing information in a death case is not simply a matter of this Court's discretion. In Gardner v. Florida, supra, the State argued that "trial judges can be trusted to exercise their discretion in a responsible manner, even though they may base their decisions on secret information." 430 U.S. at 360. The Court expressly rejected this argument as "clearly foreclosed," ibid., by Furman v. Georgia, 408 U.S. 238(1972) and "inconsistent with the basis upon which the Florida capital-sentencing procedure was upheld, Proffitt v. Florida, 428 U.S. at 254," id. at 360 n. 11. The Court recognized an Eighth Amendment right to a full and complete record in order to insure that the death penalty is applied proportionately and non-arbitrarily:

> Since the State must administer its capital sentencing procedures with an even hand, see Proffitt v. Florida, 428 U.S. at 250, it is important that the record on appeal disclose to the reviewing court the considerations

> which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia. Gardner v. Florida, supra, 430 U.S. at 361 (footnote omitted).

Further, where this Court opens itself to a major category or kind of information in some cases, but not others, proportionality is precluded.

Where neither the trial records nor this Court's decisions reflect accurately all of the information before the court in deciding capital cases, trial and appellate counsel, trial judges, and federal courts on review are deprived of the necessary basis on which to compare cases and insure that consistent standards are being applied in capital sentencing.

The receipt by this Court of different information in different cases -- information which was not before the trial jury or judge -- has eviscerated the system of checks and balances the trifurcated Florida death penalty structure was designed to guarantee. See Proffitt v. Florida, supra; Miller v. State, 332 So2d 65(Fla. 1976); Messer v. State, 330 So2d 137 (Fla. 1976). It has destroyed the statewide "consistency, fairness, and rationality in the evenhanded operation of the state law" which the Supreme Court of the United States believed to be guaranteed by the Florida capital sentencing procedure when it found that procedure facially constitutional in Proffitt v. Florida, supra, 428 U.S. at 260. The Court's practice thus has prejudiced all capital appellants, both those for whom information may have been received and those for whom it was not.

F. The Right Against Self-Incrimination and the Right of the Assistance of Counsel in Deciding Whether to Exercise that Right

An interview with correctional employees or mental health professionals who are obtaining information from an inmate is fundamentally unlike a court-ordered psychiatric examination after a defendant has himself put his sanity in issue. In the

latter case, the defendant may be deemed to have waived the right to object to such an interview. In the former case, however, the Fifth Circuit has recently held that the State may not interview an inmate without notice and waiver of his rights, when the interview will subsequently be admitted in a capital sentencing proceeding, because the inmate has a Fifth Amendment right to refuse to participate in the interview and a Sixth Amendment right to consult with his counsel concerning whether to be interviewed. Smith v. Estelle, 602 F.2d 694(5th Cir. 1979), cert. granted, 100 S.Ct. 1311(1980).

It appears clear that in the present cases, as in Smith, the death row prisoners were not told that the information derived from interviews conducted by correctional employees or mental health professionals would be forwarded to this Court, nor were they told that they had a right to refuse to participate in the interviews. See Smith v. Estelle, supra at 602 F.2d 707-708. If, under the Fifth Amendment, "a defendant may not be compelled to speak to a psychiatrist who can use his statements against him at the sentencing phase of a capital trial." Smith v. Estelle, supra, 602 F.2d at 708, then that right was completely negated here.

Furthermore, petitioners were denied the advice of counsel at a critical stage of the sentencing proceedings in their cases. For, while an attorney may have no right to be present with an inmate during an interview by a psychiatrist, see United States v. Cohen, 530 F.2d 43(5th Cir.1976), the attorney has a highly important role in assisting the inmate to decide whether the inmate should waive his Fifth Amendment rights:

> This is a vitally important decision, literally a life or death matter. It is a difficult decision even for an attorney; it requires a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, of possible alternative strategies at the sentencing hearing. . . For a lay defendant, who is likely to have no idea of the vagaries of expert testimony and its possible role in a capital trial, and who may well find it difficult to understand, even if he is told, whether a psychiatrist is examining his competence, his sanity, his long-term

> dangerousness for purposes of sentencing, his short-term dangerousness for purposes of civil commitment, his mental health for purposes of treatment, or some other thing, it is a hopelessly difficult decision. There is no reason to force the defendant to make it without 'the guiding hand of counsel' Powell v. Alabama, 287 U.S. 45, 57, 53 S.Ct. 55, 77 L.Ed. 158(1933).

Smith v. Estelle, supra, 602 F.2d at 708-709. See also Brewer v. Williams, 430 U.S. 387, 398(1977). These petitioners have been deprived of the advice of counsel as to their decisions whether to put their lives in the hands of prison personnel or other agents of the State. "The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed." Tomkins v. Missouri, 323 U.S. 485,489 (1945). Just as "a prisoner is not 'to be made the deluded instrument of his own conviction,' 2 Hawkins, Pleas of the Crown(8th ed. 1824),595," Culombe v. Connecticut, 367 U.S. 568, 581(1961)(opinion of Mr. Justice Frankfurter), neither may he be made the deluded instrument of his own execution.

G. Conclusion

The practice of this Court of requesting or receiving undisclosed information in capital cases has infected and prejudicially skewed its review of every death sentence. Under the Florida death penalty scheme, the ultimate safeguard for insuring that the process of imposing death sentences is fair, reliable and even-handed is the appellate review required to be provided by this Court. All capital appellants have suffered from this Court's practice of securing secret information. The capital sentencing process in Florida has been distorted from the form in which it was approved by the Supreme Court of the United States, and has become tainted at its highest and most important judicial level.

When the Court's decision is one involving the

ultimate penalty of death, the Constitution cannot tolerate anything short of full notice and disclosure of any and all facts being fed into the life and death equation. One of the tripartite pillars of the trifurcated sentencing process of Florida has become cracked.

V.

PRAYER FOR RELIEF

Based upon the foregoing, petitioners respectfully request their unconstitutional sentences of death be vacated and that the Court grant such other relief as may be deemed proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida 32304 by hand delivery this 29th day of September, 1980.

Samuel S. Jacobson

SAMUEL S. JACOBSON
of counsel

IN THE SUPREME COURT OF FLORIDA

JOSEPH GREEN BROWN, et al.,

Petitioners

-v.-

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Respondent.

CASE NO. 59,732

APPENDICES TO

APPLICATION FOR EXTRAORDINARY RELIEF AND

PETITION FOR WRIT OF HABEAS CORPUS

APPENDIX A

(Petitioners' Names & Case Numbers)

Joseph Green Brown	#46,925
Alvin Bernard Ford	#47,059
Jesse Ray Rutledge	#48,801
Carl Elson Shriner	#51,749
Daniel Morris Thomas	#51,692
Aubrey Dennis Adams, Jr.	#56,134
Fred Lyman Brumbley	#56,006
Daniel L. Coler	#54,250
Vernon Ray Cooper	#45,966
Gregory Scott Engle	#57,708
David Livingston Funchess	#47,828
Robert D. Heiney	#56,778
Marvin E. Johnson	#56,167
Leslie R. Jones	#56,199
Robert F. Lewis	#50,851
Bobby Earl Lusk	#59,146
Thomas McCampbell	#57,026
Charles Dwight Messer	#49,780
Floyd Morgan	#54,939
Donald Perry	#53,003
James Leroy Phippen	#54,664
James David Raulerson	#47,991
Jimmie Lee Smith	#55,961
William Gilvin	#58,743
Bryan Jennings	#59,299
Richard King	#59,464
Gregory Mills	#59,140
Robert Lewis Buford	#54,010
William Christopher	#55,698
Raymond Robert Clark	#52,716
Robert Combs	#59,425
Raymond L. Drake	#54,580
Earl Enmund	#48,525
William Jent	#58,744
Amos Lee King	#52,185
Harold G. Lucas	#51,135
Anthony Ray Peek	#54,226
Raleigh Porter	#55,841
M.C. Ruffin	#55,684
Donald Walsh	#59,512
Johnny Paul Witt	#45,796
	58,329
Steven Beattie	#56,569
McArthur Breedlove	#56,811
Alonzo Bryant	#53,230
Bobby Marion Francis	#50,127
Marvin Francois	#54,461
Lenson Hargrave	#48,135
Ronald Jackson	#47,269
Antonio Menendez	#49,294
Thomas Perri	#57,142
Wardell Riley	#49,666
Leon Scott	#56,419
Roy Stewart	#57,971
Merle Sturdivad	#59,416
Gary Trawick	#57,077
Manuel Valle	#54,572
James Adams	#45,450
Levis Leon Aldridge	#46,598
Allen L. Anderson	#52,771
David Ross Delap	#56,235
William Duane Elledge	#52,272
George Victor Franklin	#52,971
William Lanay Harvard	#47,052
James E. Hitchcock	#51,108
Monroe Holmes	#48,392
John P. Maggard	#51,614
Nollie Lee Martin	#55,716
Windford Mines	#50,996
Eldred Lonnie Moody	#52,907
James A. Morgan	#53,418
Tommy Lee Randolph	#54,869
James Franklin Rose	#51,724
Paul William Scott	#58,588
Willie Clayton Simpson	#49,681
Terry Melvin Sims	#57,510
Henry Perry Sireci, Jr.	#50,905
Joseph Robert Spaziano	#50,250
Jesse Joseph Tafero	#49,535
Solomon Webb	#58,306
William Glenn Welty	#55,497
William Melvin White	#55,875
Gary Eldon Alvord	#45,542
	57,810
Anthony Antone	#50,240
Luis Carlos Arango	#59,678
Sampson Armstrong	#48,516
Ellwood Barclay	#47,260
Richard Blair	#58,072
Bernard Bolander	#59,333
Stephen Todd Booker	#55,568
Theodore Bundy	#57,772
Johnny Copeland	#57,788
Preston Crum	#57,487
Willie Jasper Darden	#45,056
	45,108
Bennie Demps	#54,249
Ernest John Dobbert	#45,558
Howard Virgil Douglas	#44,864
John E. Ferguson	#55,137
	55,498
Charles Kenneth Foster	#48,380
Arthur F. Goode, III	#51,480
	59,453
Freddie Lee Hall	#54,423
	54,561
Carl Jackson	#48,165
Eligaah Ardalle Jacobs	#49,345
Thomas Knight	#47,599
John Wallace LeDuc	#47,953
Paul Edward Magill	#51,699
Roy McKennon	#54,172
Douglas Ray Meeks	#47,533
	48,080
Mark Mikenas	#49,928
Eddie Odom	#50,575
Timothy Palmes	#52,045
Charles W. Proffitt	#45,541
Michael Salvatore	#48,513
Frank Smith	#57,743
Carl Ray Songer	#45,584
	52,642
Walter Steinhorst	#55,087
Rufus Stevens	#57,738
Raymond R. Stone	#48,275
Ronald Straight	#52,460
Robert A. Sullivan	#44,750
William Lee Thompson	#55,697
Charles Vaught	#52,835
David L. Washington	#50,832
	50,833
	50,850
James Buford White	#54,292

INDEX TO APPENDIX B

		PAGE(S)
Jimmie Lee Jones	Memo of 1-11-75 or 9-11-75	1
Michael E. Provence	Memo of 8-29-75	2
	Order of 9-19-75	3
	Memo of 9-23-75	4
	Order of 9-25-75	5
	Letter of 9-26-75	6
	Letter of 9-29-75	7
Charles D. Messer	Memo of 9-10-75	8
	Petition for Rehearing of 5-10-79	9-17
Clarence R. Purdy	Memo of 9-10-75	18
George T. Vasil	Memo of 9-10-75	19
Ronald Jackson	Order of 12-3-75	20
	Docket Sheet	21-22
David L. Funchess	Memo of 12-15-75	23
	Order of 12-16-75	24
	Letter of 12-18-75	25
Douglas R. Meeks	Letter of 3-22-76	26
	PSR of 3-31-75	27
	Acknowledgment Letter of 3-30-76	28
Benjamin Huckaby	Acknowledgment Card of 3-26-76	29
Franz P. Buckrem	Order of 4-14-76 with Acknowledgment Card of 4-19-76	30
	Letter of 4-16-76 with Acknowledgment Card of 4-15-76	31
	Letter - undated	32
Glen S. Chambers	Memo undated	33
	Order of 5-11-76	34
	Letter of 5-18-76	35
	Letter of 5-18-76	36

		PAGE(S)
Richard H. Gibson	Order of 6-3-76	37
	Letter of 5-12-77	38
Elwood Barclay	Order of 6-7-76	39
	Letter of 6-11-76	40
	Acknowledgment Letter of 6-8-76	41
Jacob J. Dougan	Order of 6-7-76	42
	Letter of 6-11-76	43
	Acknowledgment Letter of 6-8-76	44
Monroe Holmes	Acknowledgment Letter of 6-8-76	45
Mark Mikenas	Letter of 1-21-77	46
	Letter of 2-14-77	47
Rodney W. Malloy	Order of 2-17-77	48
	Letter of 2-17-77	49
	Letter of 2-22-77	50
	Letter of 2-24-77	51
	Acknowledgment Cards dated 2-25-77 and 2-28-77	52
Jesse R. Rutledge	Order of 4-21-77	53
	Letter of 4-21-77	54
	Letter of 5-5-77	55
Fred Lyman Brumbley	Documentation of Telephone Contact of 4-25-77	56
	Order of 9-13-79	57
	Letter of 9-19-79	58
	Letter of 9-26-79	59
Joseph G. Brown	Order of 5-11-77	60
	Letter of 5-11-77	61
	Letter of 5-16-77	62

		PAGE(S)
Robert F. Lewis	Letter of 8-4-77	63
	Letter of 8-22-77	64
	Letter of 8-24-77	65
	Letter of 8-26-77	66
	Letter of 9-7-77	67
	Acknowledgment Letter of 9-8-77	68
Jesse L. Hall	Letter of 10-5-77	69
	Letter of 10-24-77	70
	Acknowledgment Card of 10-27-77	71
Enoch Lewis	Letter of 10-5-77	72
	Letter of 10-24-77	73
Harold G. Lucas	Letter of 10-5-77	74
	Letter of 10-24-77	75
Derrick M. Manning	Letter of 10-25-77	76
	Letter of 11-18-77	77
Arthur F. Goode	Letter of 11-23-77	78
	Letter of 12-2-77	79
Carl R. Songer	Letter of 1-20-78	80
	Letter of 5-9-78	81
Daniel M. Thomas	Letter of 1-28-78	82
Jon S. Miller	Letter of 1-31-78	83
	Letter of 2-2-78	84
	Letter of 2-8-78	85
Bobby M. Francis	Letter of 2-10-78	86
	Letter of 2-16-78	87
	Acknowledgment Card of 2-23-78	88
	Letter of 2-20-78	89
Paul Magill	Motion to Inspect of 6-21-78	90-91
	Order of 6-23-78	92
	PSR of 6-7-77	93
	Letter of 6-23-78	94

		PAGE(S)
Clyde Foster	Order of 5-17-79	95
John E. Ferguson	Order of 8-3-79	96
	Memo of 8-22-79	97
	Memo of 8-24-79	98
William L. Thompson	Order of 8-3-79	99
Raleigh Porter	Order of 8-16-79	100
	Response of 8-16-79	101
Freddie Lee Hall	Order of 9-28-79	102
	Letter of 10-23-79	103
	Order of 1-15-80	104
	Letter of 1-18-80	105
Jimmy Lee Smith	Order of 10-15-79	106
	Letter of 10-26-79	107
Manuel Valle	Order of 10-15-79	108
	Letter of 10-25-79	109
Raymond L. Drake	Order of 11-26-79	110
	Letter of 12-5-79	111
Marvin E. Johnson	Order of 1-15-80	112
	Letter of 1-18-80	113
Leslie R. Jones	Order of 1-25-80	114
	Letter of 1-31-80	115
	Acknowledgment Card of 2-4-80	116
Rufus E. Stevens	Order of 4-10-80	117
	Letter of 4-30-80	118
James A. Morgan	Order of 5-21-80	119
	Letter of 6-3-80 with Acknowledgment Card of 6-9-80	120
	Letter of 6-9-80	121
Preston Junior Crum	Order of 6-9-80	122
	Letter of 6-16-80	123

		PAGE(S)
George V. Franklin	Order of 6-9-80	124
	Letter of 6-16-80	125
Frank Smith, Jr.	Order of 8-6-80	126
	Letter of 8-18-80	127
	Letter of 8-26-80	128
Rocco Surace & Anthony Antone	Affidavit of 8-28-80	129

ST. PETERSBURG TIMES

city AND state

Florida, 2-8
Bothwell, 3-8
Obituaries, 7-8

section B
TUESDAY, AUGUST 19, 1980

Justices saw 'confidential' psychological profiles of death row inmates

By KELLY SCOTT
St. Petersburg Times Staff Writer
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TALLAHASSEE — Without the knowledge of defense attorneys, the Florida Supreme Court obtained psychological profiles of at least 20 men who were waiting on death row for the court to review their death sentences.

The practice apparently violated a U.S. Supreme Court decision giving all defendants a constitutional right to see and challenge any information used in determining their sentences.

"In some cases, we ended up with information we were not supposed to see," Justice Ben F. Overton conceded in an interview with *The St. Petersburg Times*.

But he said the court got the reports "inadvertently" and denied that justices actually used the reports in deciding whether the men should be given life in prison instead of death in the electric chair.

THE PROFILES were written by a psychologist in the State Department of Corrections after interviews and tests of the condemned men. The inmates were never told that the information might be used by the Supreme Court as it decided whether to uphold or overturn their sentences.

Overton, who was chief justice when the court obtained the reports, said the court had asked the Corrections Department for presentence reports, but sometimes received reports compiled after the sentencings.

Court records show, however, that the court specifically asked for the psychological profiles.

The reports were later removed from the court file, but not before some of the justices saw them.

"The appellate process was compromised," said Bruce Rogo, a professor of law at Nova University who represents a death row inmate. "It was error to go outside the record, especially without notifying opposing lawyers. It was wrong for that to happen. They have admitted that by stopping the practice."

Another defense lawyer, Ted Mack of Tallahassee, has already raised the issue with the court. On behalf of convicted killer Charles Dwight Messer, Mack is seeking a hearing to determine whether the court received a psychological report on Messer, whether any justices read it and when it was destroyed.

"I think there's a very serious legal and ethical question that the Supreme Court is going to have to answer to," Mack said in a recent interview.

It's possible that some of the defendants whose profiles were obtained by the court will get new sentencing hearings because of the mistake. The mistake will not affect the convictions themselves.

THOUGH SOME OF THE justices remembered looking at the reports, all of them said the reports had no effect on their decisions.

Alan Sundberg, who became chief justice last month, figures he read the reports. "I don't have any independent recollection," he said. "I'm sure I did."

Asked if he thought it was appropriate for him to read them, Sundberg said, "If you ask if it influenced my decision, no, I don't think it did. I'm more concerned about that transcript, what the record says ... I don't believe I was compromised, if that's your bottom line."

Justice Arthur England said he remembers seeing the reports in the files under a distinctive pink cover sheet, but he said he did

See PROFILES, 6-B

Profiles from 1-B

not read them. "The answer to your question is it would be pretty outrageous if we considered something like that, because it's not part of the record. And we haven't," England said.

"I might have seen one," said Justice James C. Adkins. "I would have casually overlooked it if I did. I've never read one. I wouldn't pay any attention to it. I would never request anything like that. I'm just not one of them that does that, requests anything further. I don't think we should."

Joseph W. Hatchett, who left the court in 1979 to become a federal appeals judge, would not comment. "You have to understand, there could be litigation on that matter, and I was a member of the court at the time," Hatchett said.

Justice Joseph A. Boyd said, "The only time we would do it (order the reports) would be if the trial record indicated there was some reason to."

BOYD SAID HE did not know that some attorneys were not aware their clients were being psychologically evaluated for the Supreme Court's review. "If the lawyer didn't get notified, I think that's very interesting. The court would like to know why that happened," Boyd said.

Even if justices did read the psychological reports, Justice Overton said, they wouldn't have considered them in determining the appropriateness of the sentence. "Judges are trained to make their consideration based solely on what is admissible," Overton said.

Fred Karl, the seventh member of the court when the reports were being received, could not be contacted.

Records of the Supreme Court and the Corrections Department show that 19 psychological reports on condemned murderers were sent to the court between November 1976 and May 1978. A psychological report on death row inmate Douglas Ray Meeks was requested and sent to the court as early as March 1976. Gov. Bob Graham signed a death warrant for Meeks on Jan. 9, 1980, but Meeks won a stay of execution.

Most of the men are still on death row, but the Supreme Court granted new sentencings or actually reduced the sentences to life for a few of the men. Among the cases are these:

- Carl Ray Songer, convicted of murdering a Florida Highway Patrol trooper in Citrus County in 1973 after escaping from an Oklahoma prison.
- Anthony Antone, convicted in the 1975 murder of Tampa policeman Richard Cloud.
- Arthur F. Goode III, convicted of killing an 11-year-old boy from Falls Church, Va. and a 9-year-old boy from Cape Coral.
- Daniel Morris Thomas, twice sentenced to death for his role as leader of the ski-mask gang, which terrorized towns in Central Florida in late 1975 and early 1976.

A PSYCHOLOGICAL REPORT was also requested and received on Jesse Lamar Hall, who was convicted in Pinellas County in 1976 of the murder of two Palm Harbor teenagers. Hall's conviction was reversed by the Florida Supreme Court late last year. Before a retrial, Hall pleaded no contest to murder and was sentenced to life in prison.

The requests for the reports apparently stopped in mid-1976, after an exchange between a defense attorney and Overton during oral arguments in the Paul McGill case.

McGill, 18, had been convicted and sentenced to death for robbing, raping and murdering a young female convenience-store clerk near Ocala. On appeal, Overton asked an assistant attorney general about McGill's reactions under stress and his suicidal tendencies.

"We have a copy of a psychological screening report and that screening report says in part that he feels very limited control in stressful situations ... and then also shows that he will become possibly suicidal," Overton said during the hearing.

Margaret Good, a Tallahassee public defender who was arguing McGill's case, told the justices she didn't have a copy of the report and didn't know it was part of the record in the case.

The next day she filed a motion to get a copy, and the court gave her one. But the same day, Ms. Good received a letter from Court Clerk Sid White stating that the psychological report had been "stricken" from the case.

Overton said he recalls that he was the one who discovered that the reports were in the files, but he does not recall whether it was because of the McGill case.

OVERTON SAID THE reports, including the one in the McGill case, were obtained by mistake during the court's effort to fulfill the edict of the U.S. Supreme Court in the case of *Gardner vs. Florida*.

Daniel Wilbur Gardner was convicted and sentenced to death for the stabbing murder of his wife in Citrus County. But the U.S. Supreme Court, while upholding the conviction, overturned the death sentence because the judge considered a "confidential" portion of a presentence report, which Gardner's attorneys had not been permitted to see.

The U.S. Supreme Court said Gardner was denied due process of law because he could not deny or explain information in the report before he was sentenced to death. The Florida Supreme Court had said that the practice was constitutional.

Gardner was resentenced to life in prison.

After the U.S. Supreme Court's ruling, Overton said, the Florida Supreme Court made a special effort to seek any information the trial judge had when he sentenced a

'In some cases, we ended up with information we were not supposed to see.'

—Justice Ben F. Overton

convicted man to death.

For example, a "Gardner order" form was printed and sent to each trial judge who sentenced a convicted man to death. The order asks the judge to return a sworn statement saying whether he or she considered any information that the defendant or his defense attorney didn't know about.

ANOTHER PART OF THE court's effort, Overton said, was to ask the Florida Department of Probation and Parole for any background report on the death row inmate, called a pre-sentence investigation (PSI) report, that the trial judge had.

"What we asked for was the PSI, and we ended up getting a post-sentence report and the psychologicals," Overton said. "It's not unusual that it (a psychological report) would be attached to the post-sentence report. That is not what we intended to have or what we should have had."

But the psychological reports were not attached simply as a matter of routine. Court Clerk White's office sent a separate letter asking for them.

One letter ordered the PSI, and copies of the letter were sent to prosecutors and defense attorneys.

The second letter went to the Department of Offender Rehabilitation, which has since been renamed the Department of Corrections. "This is to request a copy of the latest psychiatric evaluation made on the above-named inmate who is on death row." In only one case is there a notation that copies of the letter were sent to lawyers involved in the case, and that defense attorney says he never got the court's letter or a copy of the psychological report.

Overton said he did not direct White to send separate letters. "They were to get the necessary information, that's all," Overton said.

After he decided the court shouldn't have gotten the psychological reports, Overton said, he directed Sid White to "review everything in the files and make sure we didn't have anything that was done subsequent to sentencing."

WHITE, WHO IS IN charge of all court records, said Overton told him to remove all the reports from the files. The reports were destroyed, White said.

Overton could not explain why, if the requests were routine following the *Gardner* decision, psychological reports were requested on some death row defendants and not others. And the court requested at least five of the profiles before, rather than after, the U.S. Supreme Court's ruling in *Gardner*.

White says the assistant clerk who wrote the letters misunderstood his instructions and mistakenly wrote the letters requesting the psychological reports.

Overton later called *The Times* to say he had found the form letter from which the assistant typed the requests. It indicates that copies should be sent to all attorneys, Overton said. It was a clerk's error, he said, that no copies of the Supreme Court requests were actually sent to the lawyers.

"I'm not saying that people don't goof," Overton said. "Even newspapers make mistakes."

He added, "There was no intent to hide anything or no intent to get any information the lawyers didn't have."

In one of the cases the court was considering, there was a mention of a psychological evaluation done in concert with the pre-sentence investigation, Overton said. The court wanted to see that, and White's office interpreted that as an order to get psychological reports in all cases, he said.

Vernon Bradford, a spokesman for the Department of Corrections, confirmed that the Supreme Court requested the reports. There is no record, he said, of exactly how many were requested or when the practice stopped.

THE PRISON SYSTEM employs a full-time psychiatrist, a full-time clinical psychologist and two psychologists with master's degrees.

All prisoners, including death row inmates are tested when they enter the prison system and "from time to time" as part of a review of their progress, Bradford said. The prisoners are interviewed and given standardized tests. Their lawyers are not routinely notified.

These are the reports that were sent to the court, Bradford said.

"Now you have to consider, what are the legal consequences of that mistake?" said Rogo of Nova University. "Was there any harm caused? Each attorney will have to review his or her case, look at the whole record and measure this against it."

TAMPA TRIBUNE - WEDNESDAY, AUGUST 20, 1980

Justices Admit Access To Death-Row Inmate Reports

TALLAHASSEE (UPI) — Supreme Court justices admitted Tuesday they had access to psychological reports on 20 death-row inmates that they should not have seen while reviewing the appropriateness of the penalty in the cases — but denied it influenced their decisions on whether the men should live or die.

"I am satisfied to a moral certainty that the reports did not influence the outcome of any case," Chief Justice Alan Sundberg said in an interview.

"To the extent that anyone can demonstrate prejudice," he said, "the court will entertain appeals and we'll have to take it on a case-by-case basis."

Tallahassee attorney Ted Mack has raised the issue on behalf of convicted killer Charles Dwight Messer. He asked for a hearing to determine if the court received a psychological report on Messer and whether the justices read it.

"I think there's a serious legal and ethical question that the Supreme Court is going to have to answer to," he said.

If the court should find error, it would not affect the conviction, but only the sentence.

The St. Petersburg Times revealed in a copyrighted story Tuesday that the court, without the knowledge of defense attorneys, obtained psychological profiles of at least 20 men waiting on death row for the court to review their sentences. The reports were made by the Department of Correction's parole and probation section between 1976 and mid-1978.

The U.S. Supreme Court has ruled that the courts cannot use any information in sentencing a convicted murderer that is not also available to defense attorneys.

Justice Ben Overton was chief justice at the time the post-sentencing psychological reports were received. He said they were obtained by mistake by the clerk's office. When the error was discovered, he said, the reports were removed from the files and returned to the department.

Overton said the court wanted to be sure it had all the information available to the trial judge in sentencing a convicted killer to death rather than life in prison.

In one case, he said, reference was made to a psychological report that was not in the file.

"One judge (nobody now can remember which one) noticed it and asked the clerk to get the report," Overton said. One of the deputies interpreted the instruction to mean that psychological reports were to be required in all cases, rather than just the one.

Overton can recall reading only the report on the case which prompted the complaint. Sundberg can't recall any of them, but said if they were a part of the record, he must have read one or more of them.

"But I am confident it did not affect the outcome of a single case," he said.

Justice Arthur England recalled seeing the reports, but said he didn't read them, adding, "it would be pretty outrageous if we considered something like that because it's not part of the record. And we haven't." Justice James Adkins Jr. said he might have seen one or more but never read them. Justice Joe Boyd said he didn't know attorneys were unaware that their clients were being psychologically evaluated and wants to know why they weren't told.

Two other justices on the court at the time — Fred Karl and Joseph Hatchett — are no longer members. Karl is in private practice and Hatchett is a federal appeals judge.

One of the cases in which a report was requested was that of Douglas Ray Meeks for whom the governor signed a death warrant last January. Meeks won a stay of execution.

None of the 20 has been executed and most are still on death row. The court granted new sentencings or actually reduced the sentences to life for a few.

Among the cases are Carl Ray Songer, sentenced for killing a highway patrolman in Citrus County in 1973; Arthur Goode III, convicted of killing a young Cape Coral boy in 1976; Anthony Antone, sentenced in the 1975 murder of Tampa policeman Richard Cloud; and Daniel Thomas, leader of a ski-mask gang that terrorized central Florida with a series of killings in 1975.

RUBBER STAMPS

Challenge to death penalty

Papers barred, yet high court looked at them

BARBARA MALONE and KEN WALTON
Miami News Reporters

Defense attorneys across the state are preparing to attack the death sentences of all 131 people on Florida's death row, contending that the Florida Supreme Court looked at psychological reports on some of the condemned in violation of a U.S. Supreme Court ruling.

The defense lawyers say that the Florida justices violated the Supreme Court decision by looking at reports by prison psychologists without disclosing the evaluations to lawyers for the condemned.

That is grounds for overturning the sentences, said the lawyers, most of whom decline to be identified while the statewide challenge is being prepared.

"The U.S. Supreme Court has held that it is just not fair in a death case for a judge to base a death sentence on secret information — that a defense attorney has a right to know what the information is in order to argue against it," said Deborah Fins, an attorney with the NAACP Legal Defense Fund who is helping to coordinate the Florida appeal.

"If judges are making a decision about whether or not you live or die, you want to make sure that the information they are considering is accurate," Fins said.

The reports are based on mental examinations given by staff psychologists when inmates are first admitted to prison. Defense attorneys say death row inmates had no warning that what they told prison psychologists might later be used by a court in deciding whether they should live or die.

The justices acknowledge the court should not have had the reports, but say they never based a life-or-death ruling on one of them.

The defense lawyers claim the court wrongly:

- Decided on its own to obtain the reports, which weren't in trial court files.
- Didn't obtain them in all cases, and didn't explain what criteria it used in deciding when to obtain them.
- Didn't tell the lawyers on either side when it was obtaining them.

The defense lawyers say they don't know on how many occasions, or for how long, the court obtained the psychological reports in death cases.

Justice Ben Overton said the reports found their way into the Supreme Court files "inadvertently" because of an error by a deputy clerk. He said he asked the clerk to get a copy of a pre-sentence psychological report that had been considered by the trial judge but was not in the court file.

According to Overton, the deputy clerk misinterpreted his request, and began routinely ordering post-sentencing psychological reports made by staff psychologists at the Department of Corrections. Overton was chief justice at the time. Overton said he cannot remember the name of the deputy clerk.

Miami lawyer Robert Shevin, who as attorney general successfully argued the constitutionality of Florida's death penalty before the U.S. Supreme Court in 1976, said the attack is just a tactic to stall executions.

"Whenever you're dealing with the death penalty, those condemned to die are going to look for anything they can to delay the process," said Shevin.

He predicted that the legal attack might result in delaying executions "six months or a year," but that it would not result in any reversals of the death penalty.

Defense attorneys say they expect five members of the court to become witnesses. They are Chief Justice Alan Sundberg and Justices Overton, James Adkins, Joseph Boyd and Arthur England. The other two justices, Parker McDonald and James Alderman, were not on the court when it obtained the reports.

Two former justices who sat on the court when it had the reports also are expected to be called as witnesses. They are Joseph Hatchett, now a judge on the U.S. Fifth Circuit Court of Appeals, and Fred Karl, who is in private law practice.

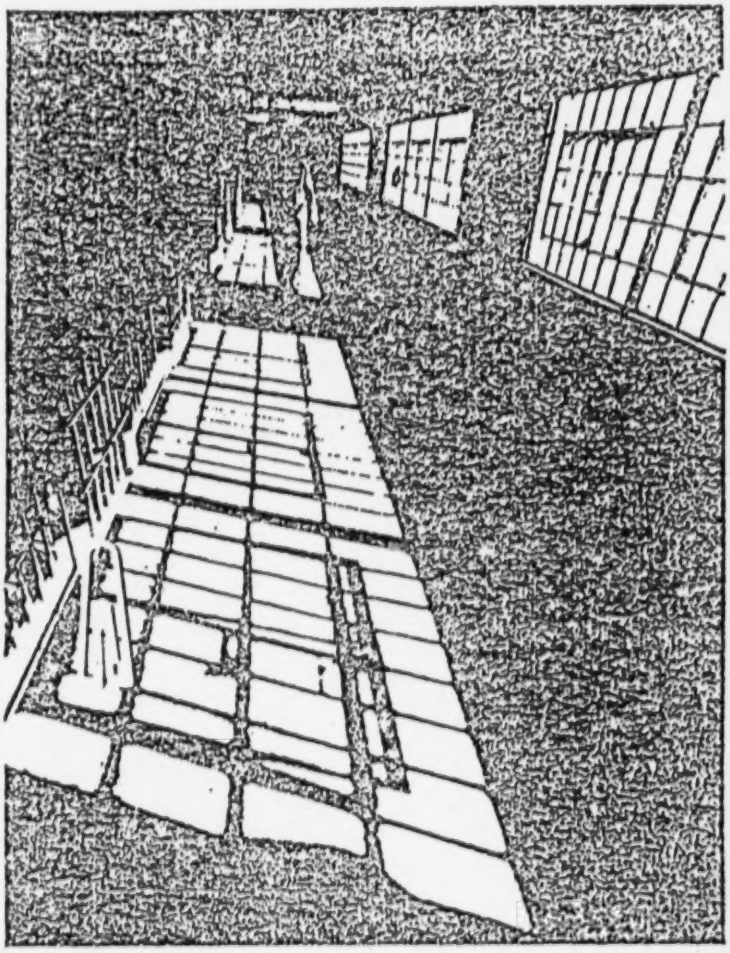
The St. Petersburg Times reported last month that the court in 1976-78 had looked at reports on some condemned men without disclosing them to defense attorneys.

"In some cases, we ended up with information we were not supposed to see," Justice Overton told the Times.

Justice Adkins told The Miami News he was opposed to the practice. "I didn't like what was going on," he said. "It looked to me like it was overreaching."

While several justices acknowledged that they read the reports while considering death sentences, they said they didn't rely on the reports in making decisions on executions.

Defense attorneys say the legal attack will be filed in both state and federal court. The challenge will contend that the court deprived death row inmates of due process of law because their lawyers couldn't explain or refute information in the reports.



The first defense attorney to learn of the practice was Assistant Public Defender Margaret Good of Tallahassee, who in mid-1978 was arguing against the death penalty on behalf of Paul McGill, an 18-year-old sentenced to die for robbing, raping and murdering a convenience-store clerk near Ocala.

Overton questioned Good about McGill's mental condition, referring to "a psychological screening report (which) says in part that he feels very limited control in stressful situations . . ."

Good told the court she did not have a copy of the report. She later filed a motion and obtained one.

The court later reduced McGill's sentence to life. It did not comment in its opinion on whether the psychological report had played a part in the decision.

The incident occurred more than a year after the U.S. Supreme Court held in March 1977, in *Gardner v. Florida*, that defense attorneys in death penalty cases are entitled to any confidential information relied on by the trial judge.

Daniel Gardner had been sentenced to death for stabbing his wife to death in Citrus County. The U.S. Supreme Court upheld his conviction, but overturned the death sentence because the trial judge considered "confidential" material not disclosed to the defendant's attorneys.

Since that time, defense attorneys from around the state have been posing information about death cases and have concluded that the psychological reports were considered by the Florida Supreme Court in at least 20, and possibly more, death cases.

Martha Hall, a former law clerk for Justice England when he was chief justice, told The Miami News that she was told to go through about 40 death row files in August or September of 1978 — shortly after Good had learned of the reports — and to pull out all psychological reports.

Hall, who is now general counsel for the Department of Environmental Regulation, said she found reports in about 30 files and removed them. She said that after collecting the reports in a manila folder, she believes she had them shredded.

Hall said she did not make a list of the defendants whose reports she removed, and that she cannot remember the names.

Hall said England's chief law clerk, Mike Rosen, told her to get rid of the reports. Rosen, who is now with a Tallahassee law firm, said he does not recall saying that.

England said he did not recall seeing any psychological evaluations, or ordering their removal from the file.

"I don't recall having seen a psychological evaluation, but that doesn't mean I haven't read one. I just don't remember," England said.

"I don't remember having a clerk remove the reports from the files, either. But if Marty (Martha Hall) says I told her to do it, I must have told her," England said.

Overton said he considers psychological reports important because a death sentence may be mitigated if the defendant was suffering from extreme mental disturbance or could not control his conduct. But when he discovered psychological reports that had not been provided to defense counsel were in the files, he said, he tried to rectify the situation.

"After I found out what happened I ordered the psychological evaluations pulled from the files because they did not belong there," Overton said.

During the period when the psychological reports were being sent to the Supreme Court, the court upheld the death sentence of John Spenkelink, who was executed in May, 1979. Spenkelink was the first — and so far the only — inmate to be executed in Florida since 1964.

Records in the Supreme Court clerk's office contain no indication that a psychological report on Spenkelink was ordered before his death sentence was upheld, according to deputy clerk Debby Cousseaux.

Hatchett said he expects the psychological reports to result in suits and he will have to excuse himself

Please see DEATH, 6A

DEATH, from 5A

from sitting as an appeals court judge because, "I'm sure to be a witness."

Adkins acknowledged seeing some of the reports, but said he "didn't pay any attention" to them. "The only thing I ever considered was the factual situation and the record that the trial judge had in front of him," Adkins said.

While Adkins said he disapproved of the court's obtaining the psychological reports, he said the fact that it did should not "becloud everything into a monumental issue that is going to turn the world upside down."

Sundberg said he remembers seeing some psychological evaluations in the files, and that he read them. "We are obliged to read a death case file from stem to stern," he said.

"I am convinced to a moral certainty that a psychological report did not affect my determination of a case because of the decision-making process I go through," Sundberg said.

Karl, who resigned from the court in April, 1978, said he could not remember whether he had seen any of the psychological reports. But, he said, "I do know that I never voted on a death case unless I could honestly say I had read every word that was available in the file."

Boyd said he "never saw any psychological reports and never read any."

"Somebody was smart enough, if those psychological reports were in there, to pull them out before they ever got to me," Boyd said.

Sid White, clerk of the Supreme Court, said he has no list of the defendants whose psychological reports were ordered, then later pulled from the files.

"You would have to go through each one of the files to look for a copy of the letter requesting the psychological report, and we have not done that," White said.

Chief Deputy Clerk Bernice Smilgin said letters requesting the reports were written by several different clerks and signed by White. Smilgin said she could not recall the name of the original clerk who got Overton's request for a report.

"We thought ordering the reports was a policy set up by the judges. We wouldn't do it on our own. We thought it was what the judges wanted," Smilgin said.

"When Justice Overton told us to stop, we stopped," she added.

Defense attorneys say searching for letters requesting the reports, as White suggested, would not show all cases in which the reports were obtained. Records at the Department of Corrections, spot-checked by The Miami News, show that in some death row cases, psychological reports were sent to the court without a written request.

Defense attorneys say they can't uncover the full extent of the practice until they take sworn testimony from the justices, their former law clerks, and deputy clerks.

If the justices should become witnesses, the case could be heard by Florida appeals court judges from around the state, or even circuit court judges.

Shevin, the former state attorney general, said he thought the attack would be relevant only in cases in which secret psychological reports had actually been read by the justices. "All of the rest of the attacks would be frivolous," he maintained.

"It's unfortunate there are these delays because if the death penalty is going to serve as a deterrent, it must be carried out," Shevin said, pointing out that although Gov. Graham has signed 12 death warrants, all but Spenkelink's have been stayed by appeals.

Graham signed two death warrants last week, ordering the executions of 25-year-old Lenson Hargrave of Miami and 30-year-old Carl Ray Songer of Citrus County. Hargrave was convicted of killing a Dade convenience store clerk during an aborted robbery in 1976; Songer was convicted of murdering a Florida Highway Patrol trooper in Citrus County in 1973.

Songer's court file shows that he is one of the condemned men whose secret psychological report was ordered from the Department of Corrections. But the file doesn't show whether the report was ever received.

Hargrave's court file contains no indication his psychological report was requested or received.